80-919

No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1980

DAVID N. MOORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the trial court committed reversible error in concluding that Petitioner's tax returns were not returns where his returns provided figures from which a tax could be computed.

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OCTOBER TERM 1980

NO.

DAVID N. MOORE,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner David N. Moore prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The published opinion of the United States Court of Appeals for the Seventh Circuit is appended to this Petition as Appendix A. The order denying Petitioner a rehearing is likewise appended to this Petition as Appendix B.

JURISDICTION

The order of the Court of Appeals was entered on August 22, 1980. Petitioner's Petition for Rehearing, timely filed, was denied on October 8, 1980. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254 (1) and Rule 20(1) and (4) of the Rules of this court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall . . . deprive any person of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

On September 20, 1978, Petitioner David N. Moore was indicted on three counts of wilful failure to file income tax returns for the years 1972, 1973, and 1974, in violation of 26 U.S.C. 7203.

Petitioner Moore's income tax return for 1972 was a joint return by Petitioner and his wife and contained their names, occupations, Social Security numbers and number of dependents. Written across the face of the return were the words "I protest this tax under the Declaration of In-

dependence of 1776 and the U.S. Constitution, Article I, Section 10 and Amendments 5, 9, and 10." The form was signed by the Petitioner and his wife but the verification was crossed out. A packet of tax protest literature was attached.

The Internal Revenue Service notified Petitioner by form letter in August, 1973, that his 1972 tax return was not a sufficient return and directed his attention to *United States* v. *Porth,* 426 F.2d 519 (10 Cir., 1970) and to the following language therein:

> "A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or regulations adopted by the Commissioner."

Petitioner replied to the IRS in a four-page letter dated January 7, 1974 in which he argued that he "did in fact file with the Internal Revenue Service a correct 1040 form" and cited in support of his position Article I, Section 10 of the United States Constitution and a number of other authorities including *United States* v. *Porth.* The IRS took no action in response to Petitioner's letter.

In May of 1974, Petitioner submitted an amended 1040 form for 1972, for himself only, on which he furnished his name, address, occupation, Social Security number, number of exemptions, number of dependents, dividends of $22, and interest income of $41. Other questions were answered with the written word "none" or the words "Object—5th Amendment." The return was signed and the verification was crossed out. With his amended 1040 form for 1972, Petitioner also filed a return for 1973 which was substantially the same as his amended form.

The IRS notified Petitioner by form letter dated July 10, 1974 that his return for 1973 was unacceptable and directed his attention to *United States* v. *Porth*, 426 F.2d 519 (10 Cir., 1970) and *United States* v. *Daly*, 481 F.2d 28 (8 Cir., 1973), which case, incidentally, distinguishes a blanket Fifth Amendment privilege and a specific claim of privilege on a particular question. Petitioner responded to this letter in October, 1974 with a personal letter requesting the IRS to answer his questions concerning income taxes. The IRS did not reply.

On April 29, 1975, Petitioner Moore wrote two letters to the IRS reiterating his questions and providing further research material in support of his arguments. The IRS responded by sending Petitioner another copy of its form warning letter. In June of 1975, Petitioner replied to this letter and filed a return for 1974 which was substantially the same as his 1973 return, with the exception that every line was filled in. The IRS form letter was again sent to Petitioner on July 2, 1975.

Petitioner was tried in June, 1979, and the jury found him guilty on all counts. Thereafter, he was sentenced to 90 days incarceration on Count I with the recommendation that he participate in a work release program. Imposition of sentence was withheld on Counts II and III and Petitioner was placed on two years probation on each count, the sentences to run concurrently with each other and consecutively to the period of incarceration.

Petitioner appealed the judgment of the District Court to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed in a judgment and order dated August 22, 1980. Petitioner's Petition for Rehearing with en banc suggestion, timely filed, was denied on October 8, 1980. The instant Petition for Writ of Certiorari follows.

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals below improperly disregarded established precedent, extended the tax crime laws and created an innercircuit conflict in concluding that the District Court properly decided that Petitioner's federal income tax returns were not returns as a matter of law.

The basis of the instant cause of action was a variety of so-called "protest" income tax return. At the time of trial, federal case law on the subject of protest tax returns had made it clear that a "taxpayer's return which does not contain *any* information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner." *United States* v. *Jordan,* 508 F.2d 750, 752 (7 Cir. 1975), quoting *United States* v. *Porth,* 426 F.2d 519, 523 (10 Cir. 1970) (emphasis added). It was undisputed at Petitioner's trial for wilful failure to file income tax returns in violation of 26 U.S.C. 7203 that he had timely filed 1040 tax forms for every year in question and that each form contained his name, address, Social Security number, number of exemptions, number of dependents and occupation. However, the questions requiring numerical answers were answered in some cases with numbers, sometimes with the word "none" and sometimes with the words "Object—Fifth Amendment". Each form was signed but the standard verification phrase above the signature was crossed out.

The crucial issues at Petitioner's trial were whether the documents timely filed with the Internal Revenue

Service were proper tax returns within the meaning of that term as defined by regulations and case law, and, if not, whether the failure to file proper returns was a good faith mistake. The trial court took the first question from the jury and instructed them that as a matter of law Petitioner's tax returns were not proper returns, thereby foreclosing Petitioner's Fifth Amendment right to present a theory of defense supported by the law and the facts, his Sixth Amendment right to trial by jury, and his First Amendment rights to freedom of speech.

On appeal, the Court of Appeals concluded that the District Court correctly decided that Petitioner Moore's tax returns were not returns as a matter of law by manufacturing two new tests which are at odds with the definition of a tax return in *United States* v. *Porth,* 426 F.2d 519 (10 Cir.), cert. denied, 400 U.S. 824 (1970), the definition adopted by almost all courts including the Seventh Circuit at the time Petitioner Moore filed the returns in question and at the time of his trial. The Court first declared that Petitioner's returns were not returns because the declaration that the tax forms were completed and signed under penalty of perjury had been obliterated on each return. In addition, the Court declared that the tax returns were insufficient because the information supplied in the returns did not manifest an "honest and genuine" attempt to meet the requirements of the Internal Revenue Code. The Court recognized that the latter holding placed the Seventh Circuit in conflict with the decision of the Ninth Circuit in *United States* v. *Long,* 618 F.2d 74 (1980), but stated:

> "If the Courts of Appeals continue to disagree the Supreme Court will eventually have to decide the question, but it is our view that when it is apparent that the taxpayer is not attempting to file forms ac-

curately disclosing his income, he may be charged with failure to file a return." Appendix A at 10.

Petitioner contends that the decision of the Court of Appeals is improper in several respects. Initially, it is evident that the Court's reliance on the lack of a proper verification on the tax returns is unprecedented and unfair. Lack of verification has never been the subject of a criminal prosecution under 26 U.S.C. 7203. The Court is forced to rely on the dubious authority of two recent Tax Court decisions upholding additions to tax for failure to file tax returns in violation of 26 U.S.C. secs. 6651(a), 6653(a) and 6654, and a number of cases involving the sufficiency of corporate tax returns under pre-Code tax law. Appendix A at 7. More importantly, neither the Internal Revenue Service or the United States Attorneys who prosecuted this case informed Petitioner Moore that the absence of verification was a part of the case against him and, as a result, Petitioner had no opportunity to prepare a defense on the issue. The lack of verification on the returns was not an issue at trial, in any event, but was raised for the first time by the government brief on appeal. Clearly, this manner of judgment by hindsight ignores Petitioner's right to a meaningful defense and a fair trial.

Equally unprecedented and far-reaching is the holding of the Court of Appeals that, even if the tax forms in the present case had been verified, they were insufficient because the information supplied did not manifest an "honest and genuine" attempt to meet the requirements of the Tax Code. The essentially subjective test thus fashioned by the Court is a radical departure from the definition of a tax return in *United States* v. *Porth,* 426 F.2d 519 (10 Cir.), cert. denied, 400 U.S. 824 (1970), which had been accepted by almost all circuits including the Seventh Circuit at the time of Petitioner's trial. What is more, the

Court hereby has created a conflict between the circuit courts. Most recently, the Ninth Circuit held returns comparable to Petitioner's to be valid returns under the *Porth* test in *United States* v. *Long*, 618 F.2d 74 (9 Cir. 1980). The Court expressly recognizes the conflict thus created, stating:

> "The Ninth Circuit is clearly correct in stating that a tax liability could be computed from zeroes, or from small amounts. . . . The mere fact that a tax could be calculated from information on a form, however, should not be determinative of whether the form is a return. . . . The government should not have to guess whether it should take the position that a form is not a return and charge the taxpayer with failure to file, or that the form is a return and charge him with filing a false return or tax evasion. If the Courts of Appeals continue to disagree the Supreme Court will eventually have to decide the question, but it is our view that when it is apparent that the taxpayer is not attempting to file forms accurately disclosing his income, he may be charged with failure to file a return." Appendix A at 9, 10.

The "honest and genuine" standard enunciated by the Seventh Circuit is not only a departure from established precedent and in conflict with the decisions of other circuits, but the source of a peculiar dilemma in the instant case. It is evident that under the subjective test propounded by the Court the question whether a return is a lawful return must be decided by the jury, as trier of fact. Notwithstanding this fact, the Court declares that in this case the trial court properly decided the issue. If the new test were to be applied by the trial court and the trial court could then instruct the jury that the tax returns at issue in a given prosecution did not evince an honest and genuine endeavor to satisfy the law, the trial

court would completely usurp the function of the jury in a prosecution for wilful failure to file income tax returns under 26 U.S.C. 7203.

It is clear from the foregoing that the Court of Appeals has created new law in order to sustain Petitioner's conviction in violation of Petitioner's constitutional rights. The Court affirms for the first time criminal penalties for failure to verify a tax return. The Court affirms for the first time that a taxpayer who does not manifest an "honest and genuine" attempt to meet the requirements of the tax code is guilty of a misdemeanor. The new law thus created by the Court of Appeals constitutes a radical departure from precedent and creates an innercircuit conflict.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be allowed to review the instant decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-2041

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID N. MOORE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 CR 639-1 — HUBERT L. WILL, *Judge.*

ARGUED JUNE 11, 1980 — DECIDED AUGUST 22, 1980

Before SWYGERT, *Circuit Judge,* WOOD, *Circuit Judge,* and LARSON, *Senior District Judge.**

LARSON, *Senior District Judge.* Defendant David Moore was charged with failing to file income tax returns for

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* The Honorable Earl R. Larson, United States Senior District Judge for the District of Minnesota, is sitting by designation.

the years 1972, 1973, and 1974, in violation of 26 U.S.C. § 7203. Defendant was tried in June 1979 and the jury found him guilty on all counts. Defendant was a businessman whose income in each of the years he failed to file was in excess of $30,000. He had filed valid tax returns for at least five years prior to 1972.

In April 1973 defendant and his wife submitted a joint return for the 1972 year to the I.R.S. This form contained only their names, occupations, social security numbers and numer of dependents. Fifth Amendment objections were written across the form and a packet of tax protest literature was attached. The form was signed by the defendant and his wife, but the verification was scratched out. The I.R.S. notified defendant in August 1973 that the forms were not sufficient returns. In a rather contentious January 1974 letter, defendant replied to the I.R.S., stating that he considered dollars to be worthless and his tax return to be adequate.

In May 1974, however, defendant submitted an amended 1040 form for the 1972 year. This form was filed for himself only. On the amended form defendant filled in the various blanks calling for numerical information with "none," except that under interest income he put $41 and under dividend income he placed the figure $22. The Fifth Amendment objections were retained and more tax protest material was appended. Although signed, the certification on the form was again marked over.

In 1974 defendant also filed a return for the year 1973 which was substantially the same as his amended form for 1972. It contained a small amount in interest income and the certification was scratched out. The I.R.S. notified defendant by letter in July 1974 that it did not consider this to be a return. In 1975 defendant filed a similar

return for the 1974 year. The I.R.S. again informed him that it did not consider this to be a return.

On appeal defendant raises a number of supposed errors made by the district court. Defendant claims that the district court allowed the introduction of irrelevant and prejudicial evidence. The district court judge allegedly participated excessively in the trial, particularly in questioning the defendant while he was testifying. Defendant contends that the instructions did not adequately inform the jury of his good faith defense. Finally, defendant contends that the district court usurped the jury's function in deciding the issue of whether or not a return had been filed. Defendant claims that the documents he filed with the I.R.S. are returns.

It is acceptable for a judge to question a witness as long as he is careful not to do so in a way which would communicate a belief in the defendant's guilt to the jury. *United States* v. *Baron*, 602 F.2d 1248, 1249 (7th Cir.), *cert. denied*, 100 S.Ct. 456 (1979). Defendant was the subject of some interrogation by the district court. The questioning was not hostile, nor was it of a type which would impair the defendant's right to a fair trial.

Defendant claims that the district court committed several evidentiary errors. Testimony accepted from an I.R.S. agent was allegedly improper. No objection was made to this evidence at trial, and it was clearly permissible in any event. Some mention was made of a trust fund which defendant had established and which the government thought may have been a tax avoidance device. Any problem here was eliminated by a stipulation that the trust fund was not intended to be used to avoid taxes. Some of defendant's returns prior to 1972-74 were introduced as evidence. It is acceptable to use earlier re-

turns to show willfulness. *See United States* v. *Stout*, 601 F.2d 325, 329 (7th Cir.), *cert. denied*, 100 S.Ct. 481 (1979), and cases cited therein. Finally, defendant contends that evidence that he purchased an expensive house and a Mercedes car during the period 1972-74 was irrelevant and highly prejudicial. Defendant said that he believed Federal Reserve Notes were worthless and therefore he did not have any real income. The use of these notes in making various purchases tends to undercut the good faith or reasonableness of a belief that dollars are worthless, and is therefore plainly relevant.

Defendant next argues that he was not given the opportunity to adequately present his theories of defense, largely because of the failure of the district court to give requested instructions. In particular, he claims that he could not present to the jury his defense of good faith. A defendant is entitled to have the jury instructed on a theory of defense which has some foundation in the evidence and which is supported by the law. *United States* v. *Cullen*, 454 F.2d 386, 390 (7th Cir. 1971); *United States* v. *Grimes*, 413 F.2d 1376, 1378 (7th Cir. 1969).

Willfulness is an element of the 26 U.S.C. § 7203 crime. Willfully in the tax crime statutes means a voluntary, intentional violation of a known legal duty. *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976); *United States* v. *Bishop*, 412 U.S. 346, 360 (1973); *United States* v. *McCorkle*, 511 F.2d 482, 484 (7th Cir.), *cert. denied*, 423 U.S. 826 (1975). The Supreme Court has specifically ruled that no additional good faith defense instruction need be given. *United States* v. *Pomponio*, 429 U.S. at 13. *See United States* v. *Sawyer*, 607 F.2d 1190, 1192 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 1338 (1980). The district

court here several times gave the correct definition of willfully to the jury.[1] It did not need to do more.

The district court apparently concluded that the true nature of defendant's defense was that he had made a mistake of law, because he believed that he had filed an adequate "return." The mistake of law defense is extremely limited and the mistake must be objectively reasonable. *United States* v. *Barker*, 546 F.2d 940, 948 (D.C. Cir. 1976). *See United States* v. *Moore*, 586 F.2d 1029, 1033 (4th Cir. 1978); *Kratz* v. *Kratz*, 477 F. Supp. 463, 480 (E.D. Pa. 1979). The district court correctly instructed the jury on this defense. After telling the jury that as a matter of law what defendant filed were not returns, the court continued:

> "The question is, did he reasonably believe that they were. . . . it is Mr. Moore's theory that during the

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[1] The district court told the jury that the government must prove that defendant "willfully, purposely as distinguished from inadvertently, negligently or mistakenly failed to file such a return." The court went on to instruct that:

> "The term willful for purposes of these instructions means voluntary, deliberately and intentionally, as distinguished from accidentally, inadvertently or negligently. Willfulness in the context of a failure to file a proper tax return simply means a voluntary, intentional violation of a known legal obligation to file such a return."

The jury's conclusion that defendant acted willfully would necessarily negate any possibility of "good faith" in failing to file. In fact, this Court, and other circuits as well, have held that only an inadvertent failure to file or a bona fide misunderstanding of the duty to file are justifiable or good faith excuses. *United States* v. *McCorkle*, 511 F.2d at 486. Good faith disagreements with the law or good faith beliefs that it is unconstitutional are not defenses. *United States* v. *Karsky*, 610 F.2d 548, 550 (8th Cir. 1979), *cert. denied*, 100 S.Ct. 1058 (1980); *United States* v. *Ware*, 608 F.2d 400, 405 (10th Cir. 1979).

> time which he was required to file these returns . . . he did timely (file) what he then reasonably believed to be a proper income tax return . . . and he did not, therefore, willfully fail to file a proper return."

It may not even have been necessary for the district court to give this instruction. The I.R.S. rejected defendant's returns because they did not contain adequate information to allow calculation of a tax liability. Defendant believed his returns were sufficient not because they provided the necessary information, but because he believed he had no legal income to report. This belief was based on the alleged unconstitutionality of the income tax and of Federal Reserve Notes. If defendant had studied *United States* v. *Daly,* 481 F.2d 28 (8th Cir.), *cert. denied,* 414 U.S. 1064 (1973), and *United States* v. *Porth,* 426 F.2d 519 (10th Cir.), *cert. denied,* 400 U.S. 824 (1970), as carefully as he claims, he would have noticed that the courts have consistently rejected these views as totally frivolous. It would appear impossible for a taxpayer to reasonably believe that Federal Reserve Notes are worthless and therefore that income received in that form does not have to be reported.

Finally, defendant contends that what he filed was a return and that the district court erred in taking this issue from the jury. The determination of what is an adequate return is a legal question and it was proper for the district court to decide that question.

Defendant asserts that he filed an acceptable return because he did provide some figures, although incomplete and inaccurate, from which a tax could be computed. He argues that his return is therefore unlike those which contain blanket objections and no income figures at all. This

is a difficult problem and one which we fortunately do not have to decide. The forms defendant supplied to the I.R.S. were not returns for another reason: they were not verified.

26 U.S.C. § 6001 states that "every person liable for any tax imposed by this title . . . shall . . . make such returns, and comply with such rules and regulations as the Secretary (of the Treasury) may from time to time prescribe." Section 6011(a) requires taxpayers to make returns "according to the forms and regulations prescribed by the Secretary." Section 6061 provides that returns "shall be signed in accordance with forms or regulations prescribed by the Secretary." Section 6065 (section 6065(a) at the time defendant filed his returns) states that "any return . . . required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury." In 26 C.F.R. § 1.6065-1(a) the Secretary of the Treasury has by regulation also required income taxpayers to verify their returns. Defendant had a duty by statute and regulation to file tax returns with a verified signature. The forms he submitted to the I.R.S. were not returns because the declaration that the forms were completed and signed under penalty of perjury was obliterated. *Cupp* v. *Commissioner,* 65 T.C. 68, 78-9 (1975), *aff'd unpub. mem.,* (3d Cir. June 10, 1977); *Ellison* v. *Commissioner,* 35 T.C.M. 1261, 1263 (CCH) (1976), *aff'd unpub. mem.,* (10th Cir. Jan. 20, 1978). *See Commissioner* v. *The Pilliod Lumber Co.,* 281 U.S. 245, 248 (1930) (corporate return); *Burford* v. *Commissioner,* 153 F.2d 745, 746 (5th Cir. 1946) (corporate return); *UHL Estate Co.* v. *Commissioner,* 116 F.2d 403, 404 (9th Cir. 1940) (corporate return).

Even if the forms had been verified, the I.R.S. could have properly rejected them as insufficient returns.[2] The tax protestor cases have forced courts to grapple with the definition of a "return." The tax code and regulations provide little guidance. In *United States* v. *Porth, supra,* at 523, the Tenth Circuit held that a return "which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code." The return in *Porth* had no information at all on income. The *Porth* test has been adopted by almost all courts, including this one. *United States* v. *Stout,* 601 F.2d 325, 328 (7th Cir.), *cert. denied,* 100 S.Ct. 481 (1979); *United States* v. *Jordan,* 508 F.2d 750, 751-52 (7th Cir.), *cert. denied,* 423 U.S. 842 (1975). It is not clear, however, what the result should be when the form does include some income figures, even if incomplete or inaccurate.

Varying positions have been taken by the Courts of Appeals. The Tenth Circuit has held that a form giving some small income amounts in "constitutional" dollars was tantamount to one giving no information, and would be treated as such. *United States* v. *Brown,* 600 F.2d 248, 251 (10th Cir.), *cert. denied,* 100 S.Ct. 233 (1979). The Third Circuit appears to have taken a similar approach in *United States* v. *Edelson,* 604 F.2d 232, 234 (3rd Cir. 1979). The form had only a total income figure, and that was in "constitutional" dollars. In *United States* v. *Smith,* 618 F.2d 280, 281 (5th Cir. 1980), the taxpayer put zeroes in some of the income blanks. The court said the "return" did not purport to disclose the required information and would not be treated as a return. Most recently, in *United States* v. *Farber,* No. 79-1815 (8th

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[2] Although not necessary, a discussion of this issue may provide useful guidance to the government in future cases.

Cir. July 10, 1980), the Eighth Circuit upheld the failure-to-file conviction of a taxpayer who had reported a small amount of income. *Id.*, slip opinion at 2 n.2. In all of these cases it was apparent from Fifth Amendment objections written on the forms and from accompanying literature that the filer was a tax protestor.

The Ninth Circuit, however, has taken the opposite position. In *United States* v. *Long*, 618 F.2d 74, 75 (9th Cir. 1980), the taxpayer submitted a form with zeroes in all the blanks. The court held that even if this information was false, a tax liability could be computed from it and it was therefore an adequate return. Part of the court's rationale appeared to be that a different penalty could be levied against those who took the chance of supplying false information. *Id.* at 75 n.4. *Cf. United States* v. *Schmitz*, 542 F.2d 782, 783 (9th Cir. 1976), *cert. denied*, 429 U.S. 1105 (1977), where the same court affirmed a conviction involving a return with zeroes and small amounts, although this was not an issue on appeal.

The Ninth Circuit is clearly correct in stating that a tax liability could be computed from zeroes, or from small amounts. The fact that the information is inaccurate only means that the tax owed, if any, will be wrong, not that it cannot be calculated. When the income information is incomplete, a more difficult problem is presented, but as long as a total income figure is given, the I.R.S. could compute the tax. Certainly a bright line rule that even a form with inaccurate or incomplete income information is a return would be easier to enforce.

The mere fact that a tax could be calculated from information on a form, however, should not be determinative of whether the form is a return. *Porth* relied in part on earlier Supreme Court cases which considered the definition of a return in another context. These cases in-

dicate that it is not enough for a form to contain some income information; there must also be an honest and reasonable intent to supply the information required by the tax code. *See Germantown Trust Co.* v. *Commissioner,* 309 U.S. 304, 308-9 (1940); *Florsheim Brothers Co.* v. *United States,* 280 U.S. 453, 462 (1930). In *Zellerbach Paper Co.* v. *Commissioner,* 293 U.S. 172, 180 (1934), it was said that:

> "Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law." (citation omitted.)

In the tax protestor cases, it is obvious that there is no "honest and genuine" attempt to meet the requirements of the code. In our self-reporting tax system the government should not be forced to accept as a return a document which plainly is not intended to give the required information.

It is important to harmonize the various tax crime laws. The government apparently prefers to charge tax protestors with failure to file—§ 7203, a misdemeanor, rather than tax evasion—§ 7201, or making false returns—§ 7206, both felonies. A serious problem might be presented if the government took the position that any form with false information on it is not a return. That is not our situation. It is not the false data which makes these returns defective, but the fact that there is no real attempt to comply with the requirement of filing a return.

The government should not have to guess whether it should take the position that a form is not a return and charge the taxpayer with failure to file, or that the form

is a return and charge him with filing a false return or tax evasion. If the Courts of Appeals continue to disagree the Supreme Court will eventually have to decide the question, but it is our view that when it is apparent that the taxpayer is not attempting to file forms accurately disclosing his income, he may be charged with failure to file a return.

The conviction is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 8, 1980

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. EARL R. LARSON, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-2041 vs.
DAVID N. MOORE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-Cr-639
Judge Hubert L. Will

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* The Honorable Earl R. Larson, United States Senior District Judge for the District of Minnesota, is sitting by designation.

No. 80-919

In the Supreme Court of the United States

OCTOBER TERM, 1980

DAVID N. MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of his conviction for failure to file federal income tax returns for 1972, 1973, and 1974, claiming that the Forms 1040 that he filed with the Internal Revenue Service for those years met the return filing requirements of the Internal Revenue Code.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of failure to file income tax returns for 1972, 1973, and 1974, in violation of 26 U.S.C. 7203. Petitioner was sentenced to 90 days' imprisonment on the first count, with a recommendation for a work release program. The trial court suspended sentence on Counts two and three, and placed petitioner on two years' probation for each count. The court of appeals affirmed (Pet. App. A).

The pertinent facts may be summarized as follows: For 1972-1974, petitioner filed "protest returns" or forms

which provided the Internal Revenue Service with no information from which it could compute a tax. During these years, petitioner was a partner in a jewelry business and the president and part owner of Prestige Vacations, Inc., a travel agency located in Oak Brook, Illinois. In the years in question, petitioner earned gross income in excess of $30,000 per year. For at least five years prior to 1972, petitioner filed valid and complete tax returns (Pet. App. 2).

For 1972, petitioner and his wife filed a Form 1040 containing only their names, occupations, social security numbers, and dependents (Pet. App. 2). Petitioner wrote Fifth Amendment objections across the form and attached tax protest literature to the form. The spaces for financial information were left blank. Although petitioner signed the form, he crossed out the verification calling for imposition of the penalty of perjury for false certification of returns (*ibid.*).

In 1974, petitioner filed an amended form for 1972 for himself. On the line for wages, salary and other compensation, petitioner wrote "none". Below it, he wrote "[o]bject—Fifth Amendment". Under interest income, he put $41, and under dividend income, $22. He again crossed out the certification and signed the form. In 1974 and 1975, petitioner also filed Forms 1040 for 1973 and 1974 which were substantially the same as the amended form that he filed for 1972 (Pet. App. 2-3). After each filing, the Internal Revenue Service informed petitioner that the forms did not constitute sufficient returns (*id.* at 2).

1. The court of appeals correctly held that petitioner had failed to file tax returns because the Forms 1040 he submitted were not verified.

Contrary to petitioner's argument (Pet. 6), the decision below does not create a new test for defining income tax returns. Section 6065 of the Internal Revenue Code of 1954

(26 U.S.C.) provides that returns shall contain or be verified by a written declaration that they were made under penalties of perjury. When petitioner excised the statement of certification under penalty of perjury from the line above his signature, he did not comply with the statutory requirement that returns be verified. This Court has held that a return, unsupported by oath, does not meet the filing requirements when the statute requires that the return be verified by oath. *Lucas* v. *Pilliod Lumber Co.*, 281 U.S. 245, 248 (1930). *Cupp* v. *Commissioner*, 65 T.C. 68, 78-79 (1975), aff'd without opinion, 559 F. 2d 1207 (3d Cir. 1977); *Vaira* v. *Commissioner*, 444 F. 2d 770, 777 (3d Cir. 1971); *Ellison* v. *Commissioner*, 35 T.C.M. 1261, 1263 (1976), aff'd in an unpublished opinion, No. 76-2178 (10th Cir. Jan. 20, 1978).[1]

The determination whether a Form 1040 upon which the verification has been deleted meets the requirement of Section 6065 that a return contain or be verified by a written declaration that it is made under the penalty of perjury does not involve the resolution of any factual questions. Rather, the determination is purely a legal question, and, that should be decided by the trial judge, not by the jury. *United States* v. *Jordan*, 508 F. 2d 750, 753 (7th Cir.), cert. denied, 423 U.S. 842 (1975). Thus, contrary to petitioner's claim (Pet. 5-6), the trial court did not violate his constitutional rights by its instructions to the jury that the forms filed by petitioner were not valid returns under the statute.

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[1]In *Plunkett* v. *Commissioner*, 41 B.T.A. 700, 710-711 (1940), aff'd, 118 F. 2d 644 (1st Cir. 1941), the Board of Tax Appeals (now the Tax Court) concluded that a change in the law, removing the oath requirement and substituting a verification subject to perjury penalties, was merely a change to avoid inconvenience to taxpayers and was not intended to change the result in *Pilliod Lumber Co.* See also *Cupp* v. *Commissioner*, *supra*, 65 T.C. at 79.

2. Petitioner further argues (Pet. 8) that the decision below conflicts with *United States* v. *Long*, 618 F. 2d 74 (9th Cir. 1980). There, the taxpayer filed Forms 1040 on which he had inserted zeros in the spaces calling for number of exemptions and amounts of income, tax, and tax withheld. He also attached a copy of a tax protest tract to his Form 1040. On these facts, the court of appeals reversed a conviction for failure to file tax returns on the ground that the zeros entered on the forms constituted information from which the tax could be computed. As the court saw the matter, "[t]he I.R.S. could calculate assessments from Long's strings of zeros, just as it could if Long had entered other numbers. The resulting assessments might not reflect Long's actual tax liability, but some computation was possible" (618 F. 2d at 75). On this basis, the court distinguished the case from *United States* v. *Porth*, 426 F. 2d 519 (10th Cir.), cert. denied, 400 U.S. 824 (1970), and similar cases in which the defendants failed to complete tax forms or left them blank (618 F. 2d at 75-76). Although the court in *Long* held that the government did not prove the defendant guilty of failure to file, it observed that the government might have sustained some other charge (presumably a charge of filing a false return) (*id.* at 76).

We question the soundness of the ruling in *Long* that the Internal Revenue Service could calculate tax liability from the zero entries so that the defendant's form in that case met the return filing requirements. At all events, the decision below does not conflict with *Long*. The instant case was not decided upon the basis that the Forms 1040 petitioner submitted did not contain information from which tax liabilities could be computed, but rather, upon the basis that the Forms 1040 were not verified as required by the statute. Indeed, the court of appeals expressly recognized (Pet. App. 8 n.2) that its disapproval of *Long* was dictum.

Moreover, even if the forms petitioner submitted had been verified, the facts of this case are not sufficiently comparable to *Long* to establish a conflict of decisions. While the defendant in *Long* simply entered zeros on his Form 1040, here petitioner entered no numbers on his forms from which his tax arguably could be computed. To the contrary, he simply entered the word "none" or "[o]bject—Fifth Amendment," or a combination of both. On two lines, he entered token figures for interest and dividend income. The Internal Revenue Service could not have computed his total tax liability from these figures. Indeed, this case is comparable to one in which this Court recently declined review. See *United States* v. *Smith*, 618 F. 2d 280 (5th Cir.), cert. denied, No. 79-6894 (Oct. 6, 1980). There, the defendant reported on his form that he had "[l]ess than $750.00 constitutional dollars as defined by the U.S. Constitution" and that "$ is used to indicate constitutional dollars (gold or silver coin)" (79-6894 Pet. 4). Similarly, petitioner explained in a letter he wrote to the Internal Revenue Service (Pet. App. 2; Def. Exh. 2) that he believed that Federal Reserve Notes were not money and that he was not subject to any tax liability because he had not earned any gold and/or silver coin. Thus, it is clear that petitioner was reporting that he received no "income," as he defined that term—not that he had no "income" as that term is defined by Congress in Section 61(a) of the Internal Revenue Code of 1954. See *United States* v. *Edelson*, 604 F. 2d 232 (3d Cir. 1979); *United States* v. *Brown*, 600 F. 2d 248, 251 (10th Cir. 1979). As in *Smith*, *supra*, the court below therefore correctly affirmed petitioner's conviction for failure to file a return from which his tax could be computed.[2]

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[2]While perfect accuracy is not necessary to rescue a tax return from being a nullity, the return must be sworn to and evince an "honest and genuine" endeavor to satisfy the law. *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 180 (1934). Thus, contrary to petitioner's assertions

Thus, even on the assumption that *Long* correctly held that the Internal Revenue Service could calculate tax liability from a "string of zeros," the Ninth Circuit's reasoning in that case would not support petitioner's claim. By prescribing his own definition of income, petitioner gave the Internal Revenue Service no basis from which his tax liability could have been computed. Hence, it does not appear that the Ninth Circuit—which addressed the question whether tax liability can be computed from zero entries—would have reversed petitioner's conviction for failure to file.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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(Pet. 7-9), the "honest and genuine" standard is not new to the law. See also *United States* v. *Brown*, 600 F. 2d 248 (10th Cir. 1979) (when accused is charged with failure to file and it appears that the return is a pretext, it is tantamount to not filing at all).